Supreme Court, U.S.
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No. _____

IN THE

Supreme Court of the United States

October Term, 1997

JOHN WILSON,

Petitioner,

v.

THE STATE OF WASHINGTON;
DARRELL HAMILTON, M.D.; KATY WILLIAMS;
DAVID WATSON; and JOHN REYNOLDS,

Respondents.

PETITION FOR WRIT OF CERTIORARI
To the Washington State Court of Appeals, Division II

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38 pp

QUESTIONS PRESENTED

Whether the Supreme Court will examine and clarify the substantial amount of conflicting case law generated by the various circuit courts and reflected in the state appellate court opinion herein, relating to the First Amendment rights of public employees to speak out on issues of public concern?

Whether the first element of a public employee's free speech claim - whether the speech involves "a matter of public concern" - must always be treated as a question of law for the court to decide or, whether under appropriate circumstances, it may be treated as a question of fact subject to resolution by a jury?

Whether an appellate court, in reviewing a jury verdict in favor of a public employee on a violation of free speech claim, has the authority, under the guise of applying the *Pickering* balancing test, to manufacture justifications for suppression of speech and find speech unprotected based on such justifications, when the manufactured justifications were neither articulated nor relied upon by the public employer when it made the allegedly unlawfully retaliatory adverse employment decisions?

Whether a court should even examine the *Pickering*

balance element of a public employee's First Amendment free speech claim when the public employer has denied that the exercise of free speech played a role in the adverse employment decision?

Whether the State Appellate Court decision at issue herein placed unwarranted and undue emphasis on the private and work related nature of the petitioner's exercise of free speech in determining the speech was unprotected when the precedent of this court and the circuit courts indicated that neither consideration is dispositive when determining if a public employee's speech is worthy of protection?

Does a public employee, in a First Amendment case, have to show, in order to defeat a claim of qualified immunity, that prior case law has a substantial correspondance to the fact pattern at issue, or is it sufficient that the law simply be so clearly established that a public official is on notice that his actions could be unlawful?

Petitioner, John R. Wilson, respectfully prays that a certiorari issued to the judgment and opinions of the Washington State Court of Appeals, Division II.

OPINION BELOW

The decision of the Court of Appeals as amended is reported at 84 Wn.App. 332, ___ P.2d ____ (1996) and reproduced at Appendix A. Additionally, a notation of the denial of the petition for review to the Washington Supreme Court is located at 131 Wn.2d 1022, ___ P.2d ___ (1997) and is reproduced at Appendix B.

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STATEMENT OF JURISDICTION

The decision of the Washington State Court of Appeals was filed initially on August 29, 1996. A motion for reconsideration was filed. On December 20, 1996, an order was issued denying reconsideration but modifying and re-issuing the opinion with minor, non-material changes.

Jurisdiction is conferred on this Court by 28 U.S.C. § 1257 (constitutional question) and 28 U.S.C. 2101(c). This petition is timely under the terms of Supreme Court Rule 13(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the First Amendment to the United States Constitution and 42 U.S.C. § 1983, the pertinent text of which are set forth in Appendix C.

STATEMENT OF THE CASE

A. Factual Background

For the mentally ill, often the only hope is a pharmacological solution. Petitioner John "Jack" Wilson was the former director of Western State Hospital pharmacy (hereafter WSH). In 1985, after being heavily

recruited by defendant Darrell Hamilton he reluctantly assumed the position. On his arrival, the place was in disarray and it was understood that it was in need of a long-term administrative overhaul. (RP 161-77, 189-267). It was such a disaster that the WSH's pharmacy failed a Medicare survey and $40 million in funding was in jeopardy.

Heroically, Dr. Wilson was quickly able to get organized and passed another survey a few months later. (RP 270). The ensuing years were marked with astounding success. Staff grew from eight to twenty-nine. By 1988, the pharmacy was recognized as one of the 50 best hospital pharmacies in the country. (RP 21-24, Ex. 1).

Dr. Wilson and his management team, trying to keep WSH in conformance with the best of national standards and progressive organizational ideas, began developing an internal credentialling system that allowed pharmacists with demonstrated abilities to move from dispensing tasks to "clinical work", i.e., actually consulting with the doctors and patients as part of the treatment team. (RP 860-61). This system was non-elitist and allowed bachelor-degree pharmacists to participate in clinical work along with those with doctorates (who qualified).

Defendant Williams, a Ph.D., objected to this system and elitistly told others "if you want to do clinical work, you should go back to school." As time progressed, the scope of Williams' disgruntlement widely multiplied and set into motion a bizarre set of events with twists and turns that, within a relatively short period of time, resulted in Jack Wilson, the savior of the WSH pharmacy department, being "rubber roomed".[4] Rubber room, i.e. being stripped of his duties, assigned to do demeaning simple tasks, assigned to a desk in a dim hallway without a phone or in a file room with a basement window well where the patients would often urinate. (RP 521-35).

On September 9, 1989, Wilson received an exceptional evaluation. (Ex. 5).

His demise commenced on October 23, 1989 when the paragematic disgruntled self-interested employee Katy Williams wrote a memo to him with a copy to Hamilton complaining of unequal dispensing time. (Ex. 43).[5] While Dr. Wilson was on vacation, Hamilton and Williams met

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[4]Not surprisingly, Dr. Williams did not score as well as some of the bachelor-degree pharmacists in some of the earlier credentialling tests. (RP 103).

[5]In this memo, no mention was made that Williams somehow believed she was a victim of gender discrimination.

behind Dr. Wilson's back. (RP 324, 677).

On approximately November 28, 1989, Dr. Wilson returns from vacation/Thanksgiving, and was confronted with Hamilton telling him he has discussed the memo with Katy, has determined that her complaint constitutes gender discrimination; that he will support her; and orders Dr. Wilson to "equalize dispensing time." In fact, there were two male Pharm.D's, one who did more dispensing and one who did less than Katy. (RP 327).

Thereafter, there were numerous discussions and memos between Hamilton, Dr. Wilson and Williams, and meetings with Dr. Wilson and his management team. Dr. Wilson explained to Hamilton that if he gave Williams such a remedy when no discrimination occurred, it would "pull the tent pole" from under the organization. The credentialling and a job-description package, which involved large taxpayer investments, would be in jeopardy. He would be forced to adjust each employee's tasks to the minute whenever they complained of unequal allocation of job tasks, thus detracting from the mission of the agency. (RP 328-331).

On January 3, 1990, Dr. Wilson submitted the "white paper" to Hamilton, stating concerns about the potential adverse effects the Williams matter could have on

the efficiency of the mission of the pharmacy (Ex. 9).

> Any decision involving special task assignment of Dr. Williams or any pharmacy staff must be consistent with the pharmacy department's fundamental 1985 competency-based philosophy. To now abandon a competency-based philosophy for a degree-based philosophy would have severe repercussions since it would:
>
> a. be contrary to local and national standards;
>
> b. be contrary to competency-based 1989 WSH by-laws;
>
> c. demonstrate inconsistency on the part of management which has emphasized and established competency as the single most important criteria for special task assignment;
>
> d. lead to potential resignations and/or grievances from several B.S. staff who are already on record as opposing any such inconsistencies as subjective, unfair partiality/favoritism, elitist and grounds for discrimination; and
>
> e. Require the department to expeditiously develop a new philosophy in its place and modify or abolish numerous other procedures/practices since the current philosophy is pervasive throughout the department's operations.

Hamilton wrote a memo to Dr. Wilson ordering him to collect data on how clinical pharmacists spent time. (RP 428-9).

Dr. Wilson received another memo from Hamilton (dated January 12), ordering action by the 19th, saying he should cease gathering the data because Hamilton has made up his mind. He also ordered Dr. Wilson to discontinue "other time study logs - they are counterproductive." (RP 429-30, Exhibit 10). (This document showed up later as the sole document in support for a 51-point grievance submitted by 11 technicians.)

Dr. Wilson called Hamilton and told him he would comply with his order to equalize dispensing time among all Pharm.D's, but would resign the next day. He requested a courtesy meeting with hospital superintendent (and defendant) John Reynolds. (RP 432-33). At the meeting, Reynolds sided with Dr. Wilson. Hamilton was furious. (RP 434). A second meeting, or "hearing," was held. Reynolds again upheld Dr. Wilson. (RP 435-6).

Dr. Wilson was presented with a "pre-settlement agreement" based on an Office of Equal Opportunity investigation which had been going on without his knowledge in the ensuing months. As determined by the document trail in discovery, Reynolds had no sooner taken Dr. Wilson's side in January, than he had forwarded the information to the OEO taking the opposite side. (RPs 437-448, 1186-7).

On May 4, 1990, eleven of the fourteen technicians signed a 50-plus-point "grievance" accusing Dr. Wilson of dishonesty, violation of laws, regulations and policies, and so forth, to the extent that if they had been true, Dr. Wilson would have had his pharmacist credentials rejected and probably been sentenced to prison. (RP 337-8). Dr. Wilson was not allowed, informally or formally, to inquire as to details of the allegations. (RP 339).

At trial, substantial circumstantial evidence was presented to show that Williams fomented and was a motivating force behind the grievance. (RP 463, 698-9, 906, 790, 800-01).

In June of 1990, the Medicare survey team, with the same pharmacist evaluator who had failed the pharmacy in 1985, passed the pharmacy with flying colors. The evaluator told the pharmacists at a meeting that they were doing some of the finest work he had ever seen. (RP 479-481).

The next day, a day after the Medicare survey team left, Hamilton called Dr. Wilson in and "temporarily" relieved him. He told Dr. Wilson he would run the pharmacy himself, and would talk to Dr. Wilson every day. In fact, he did not talk to Dr. Wilson at all.

(RP 480-481, 912).

On July 3, 1990, Hamilton named Williams as head of the pharmacy. (Exhibit 81, RP 913). Thereafter, Dr. Wilson took several months off, suffering severe emotional distress.

In September, (a father of six) Dr. Wilson went back to work, and Williams placed him at a desk next to the receptionist, without a phone, doing full-time dispensing. RP 501. Williams played, or allowed others to play, the song "Hit the Road, Dr. Wilson," over the pharmacy public address system on many occasions. (RP 706). Defendant David Watson became his supervisor, and treated Dr. Wilson in a humiliating and demeaning manner. (RP 502). He would formally discipline Dr. Wilson, for example, for "improper" use of the fax machine for sending some pharmacy-related information to an attorney, while Watson himself used the fax machine to send and receive obscene cartoons. (RP 504-5, Exhibit 23).

Watson secretly recorded private conversations between he and Dr. Wilson. Such recording was (and is) violative of state law. Watson contended that the recordings would exonerate him, but did not produce the tapes. (RP 879-81). Hamilton told the superintendent

in an October 9 memo, Exhibit 25, that he had instructed Watson to return the tapes (plural) to Dr. Wilson. However, in a handwritten note at the bottom of an October 18 memo, Hamilton wrote, "Watson, destroy those tapes." (Exhibit 26, RP 510).

Williams approved two persons attending the Washington State Hospital Pharmacist Association meeting at state expense, but denied Dr. Wilson's similar request, even though he was the president. (RP 511-512).

Watson stole a computer disk belonging to Dr. Wilson and lied about it. When Dr. Wilson discovered it and complained, he (Dr. Wilson) was removed from the Pharmacy and sent to work for Dr. Ira Klein. They took his key to the pharmacy away, and his manual for drug use control. (RP 512-514). That took away his access to the library, and interfered with his ability to function as a professional. (RP 521-522, 525-6).

After several months of working for Dr. Klein, Dr. Wilson was returned to Hamilton's supervision. Hamilton ordered him out of his modern office, and assigned him to a desk in a smelly basement corridor with dim lighting, and no phone. He removed Dr. Wilson's computer. (RP 530). Dr. Wilson was assigned to work

that could have been done by a technician. (RP 528-9, Exhibit 29). In the five years since, no management person ever asked him for any suggestion as to how he could make a better contribution to patient care with his high level of training and expertise. (RP 1199).

He was forbidden from consulting with his professional colleagues. (RP 536).

After about five months in the hallway, he was transferred to a file room with a basement window in a well where patients often urinated -- even more unpleasant than the hallway. (RP 534-35).

Several years later, Dr. Wilson was asked to perform consultations on the wards, still without access to literature, still without collegial discourse. (RP 537-8). That caused him to choose between embarrassment at not being current, or making recommendations that might harm a patient. (RP 537-8).

Dr. Wilson thereafter received wildly false employee evaluations and was repeatedly accused of wrongdoing and subjected to "kangaroo courts" and false and unfounded allegations of wrongdoing. (RP 97, 341-62, 465-76, 545-6, 829, 1152, 1156).

B. Procedural History

On or about June 10, 1992, Jack Wilson, as

Plaintiff, filed a Complaint for Damages in the Pierce County, Washington Superior Court (Cause No. 92-2-05810-9) alleging several claims including a 42 USC § 1983 claim that he had been subject to retaliatory adverse employment decisions in reprisal for exercising his right to free speech under the First Amendment to the federal constitution. (CP 4-7).

On April 28, 1995, the Honorable Brian Tollefson heard defendants' motion for summary judgment. Judge Tollefson, among other things, dismissed plaintiff's First Amendment claim but allowed the case to proceed to trial on claims of outrage, defamation and civil conspiracy.

The case was called for trial on May 3, 1995. The first matter considered was plaintiff's motion for reconsideration of the dismissal of petitioner's First Amendment claim. (RP Vol. I). After extensive argument, Judge Tollefson granted the motion for reconsideration, and reinstated the First Amendment and a conspiracy to violate federal rights claims. (RP I p. 39).

Plaintiff put on his case in chief. It lasted several days. On May 12, 1995, plaintiff rested his case in chief and defendants moved to dismiss all claims. (RP 8, p. 1029).

After hearing argument, Judge Tollefson reserved ruling on plaintiff's First Amendment claim. (RP 8, p. 1055). He dismissed the outrage claim due to insufficient evidence and the defamation claim on statute of limitations grounds. (Id., p. 1052-54). However, he viewed defamation as being one of the unlawful acts that still could be considered as evidence on plaintiff's conspiracy claim. (Id., p. 1054).

Ultimately, Judge Tollefson ruled as a matter of law that plaintiff had satisfied the public concern and balancing elements of a public employee's First Amendment claim. (RP 9, p. 1063-67).

Thereafter, the defendants went on to put on their own case-in-chief. (RP 9, p. 1075-1150). Plaintiff then put on a short rebuttal case. (RP 9, p. 1150-1221). The defendants did not move for a directed verdict at the close of the evidence, nor did they renew their motion to dismiss at the close of the evidence. (RP 9, p. 1074).

On May 17, 1995, exceptions were taken to the Court's Instructions (RP 10, p. 1232-1248).

Significantly, Court's Instruction Nos. 7 and 8 were crafted by the Court after its informal meeting with counsel. The court's instructions on the First

Amendment claim were essentially a shortened version of Defendants' Proposed Instruction which also gave the public concern and balancing elements to the jury. Petitioner, not the defendants took exception to this instruction.

On May 18, 1995, the jury returned a verdict of $9,000,000.00 in favor of Jack Wilson. (CP 466-69).

After failed attempts at post-trial relief, defendants appealed. The Court of Appeals reversed the judgment as set forth in Appendix A. Petitioner sought reconsideration. The motion for reconsideration was denied, but the opinion was amended to reflect correction of factual error and re-filed on December 20, 1996.

Petitioner filed a timely petition for review to the Washington State Supreme Court. On May 6, 1997, without comment, the Washington State Supreme Court declined review.

REASONS FOR GRANTING THE WRIT

The decision of the Washington State Court of Appeals conflicts with the precedent of the United States Supreme Court, the Federal Circuit Courts and the Washington Appellate Court's own First

Amendment Related Cases. Further, the instant matter provides the Supreme Court the opportunity to address and define the appropriate methods, manners and procedures to be utilized on a public employee's claim that his First Amendment rights have been violated by adverse employment actions taken in retaliation for engaging in speech on a matter of public concern and the availability of qualified immunity on such a claim.

A. Public Concern.

In the instant matter, the respondents repeatedly denied that they engaged in adverse employment actions in response to petitioner's exercise of free speech but a jury found otherwise. Yet, the state appellate court found "on balance" the employer's interest outweighed the employee's despite the fact that, at trial, the government never raised such interest as a justification for its actions. In other words, under the guise of deciding a question of law through pure fiat, the state appellate court not only substituted its judgment for that of the jury but also gave the public employer the benefit of a decision it never made. It is submitted such actions are at odds with clearly defined precedent and set a dangerous precedent that will abrade public employees' abilities to speak out on issues

of public concern.

> Silencing a public employee to speak on a matter of public concern deprives a self-governing society of information that may be vital to informed decision-making.

Azzaro v. County of Allegheny, 110 F.3d 968, 977 (3rd Cir. 1997) (en banc).

In determining whether a public employee's speech is worthy of First Amendment protection, it first must be determined if it addresses a matter of "public concern". *Johnson v. Multnomah County*, 48 F.3d 420, 421 (9th Cir. 1995). Previously, the Court of Appeals recognized that this threshhold determination must be interpreted liberally in favor of protection. See *Edwards v. DOT*, 66 Wn.App 552, 561, 832 P.2d 1332 (1992).[6] Speech is on a matter of public concern if it relates "...to any matter of political, social or other concern to the community." Id. Only when speech "solely" addresses internal policy and personnel grievances it is wholly unprotected. *Lambert v. Richard*, 59 F.3d 134, 135 (9th Cir. 1995).

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[6]Similarly, the Washington Supreme Court recognized in an opinion that followed shortly on the heels of *Wilson*, "...that even the slightest tinge of public concern is sufficient to satisfy the first step..." (Emphasis added). *White v. State*, 131 Wn. 2d 1, 12 n.5, ___P.2d___ (1997).

As previously recognized speech which addresses a mixture of public and private concerns is nevertheless protected if, once matters relating to pay, hours, and working conditions are removed, the matter still addresses issues of public concern. See *Thompson v. City of Starkville,* 901 F.2d 456 (5th Cir. 1990) (Collecting cases). However, speech which addresses working conditions and morale can be afforded protections if it otherwise is of relevance to the public's evaluation of governmental performance. *Lambert v. Richard,* 59 F.3d at 137, *McKinley v. City of Eloy,* 705 F.2d 1110 (9th Cir. 1983).

Such a determination is made by examining "the content, form and context of a given statement, as revealed by the whole record." *Johnson v. Multnomah County,* 48 F.2d at 422 *quoting Connick v. Myers,* 461 U.S. 138, 147-48 (1983). Generally, such determinations involves a question of law, however, that is not absolute and when a factual dispute exists as to what was the speech, it must be determined by a fact-finder. See *Waters v. Churchill,* 511 U.S. 661, 114 S.Ct. 1878, 128 L.Ed.2d 686 (1994).

In the instant matter, the trial court viewed the protected status of speech as a threshold legal

determination for the court prior to submission of this mixed question of law and fact to the jury. Given the factual nature of the inquiry, it is submitted that was an appropriate approach under *Waters* and the appellate court's view to the contrary was erroneous. As it is, the issue went to the jury on respondent's instructions over petitioner's objections and it is puzzling that the appellate court would usurp the jury's factual determination on an issue subject to obvious waiver.

It is suggested one of the underlying purposes of treating the protected status of speech as an issue of law is to ensure unpopular points of view are not drowned by popular sentiment. Here, the opposite occurred with the Court of Appeals, without the benefit of actually hearing the testimony, engaging in not only fact-finding, but fact creating.

Here, a portion of petitioner's speech could be characterized as resisting a bogus claim of gender discrimination. Such potentially "politically incorrect" speech should nevertheless have been afforded full protection. See generally *Meyers v. City of Cincinnati*, 934 F.2d 726 (6th Cir. 1991).

Content is the greatest single factor in the inquiry. *Johnson v. Multnomah County*, 48 F.2d at 425.

The inquiry is objective and speech can be deemed protected even if it was an unintended consequence. *Zorzi v. County of Putnam,* 30 F.3d 885, 897 (7th Cir. 1994). Contrary to the Court of Appeals' opinion, while the speaker's "motive" is a marginal factor that can be considered in close cases, it is no where near dispositive. *Johnson v. Multnomah County,* 48 F.3d at 425. See also *Azzaro v. County of Allegheny,* 110 F.3d 968, 978 (3rd Cir. 1977) (en banc).

There is no question the Court of Appeals, based on no more than its opinion on matters where credibility was critical, elevated motive over content.

The Court of Appeals' observation at page A-16 that speech occurring in the discharge of duties is likely to be unprotected is wrong and makes little sense. The whole purpose of the public employee First Amendment doctrine is to ensure that public employees do not relinquish First Amendment rights and to ensure when matters of public concern arise during the course of employment, the employee can speak out. See *Azzaro v. County of Allegheny,* 110 F.3d at 979. Speech has often been deemed protected when it addresses the basic functions within the employee's job duties. See, e.g., *Roth v. Veteran's Admin.*, 856 F.2d 1401 (1988).

Similarly, the Court of Appeals' observation that employee speech that is in the form of "opinion" is unworthy of protection is difficult to square with federal First Amendment jurisprudence. See *Rankin v. McPherson*, 483 U.S. 378, 388 107 S.Ct. 2891, 97 L.Ed.2d 1315 (1987). Under federal precedent, even recklessly false speech may be worthy of protection. See *Johnson v. Multnomah County, supra*.[7]

Finally, with respect to the "guidelines" of the Court of Appeals', it is noted that it is a simple truism that a manager may have less First Amendment protection to speak out against an agency's policies, but such a consideration is more properly part of the second element of a First Amendment claim - the *Pickering* balance. See *Wheaton v. Webb-Petitt*, 931 F.2d 613, 618 (9th Cir. 1991). However, when it comes to management employees, it is a "curious logic" indeed to provide no or little First Amendment protection to a manager who often is in the best position to influence

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[7]The Court of Appeals made such an observation on an extremely narrow reading of *Koch v. City of Hutchinson*, 847 F.2d 1436 (10th Cir. 1988). In *Koch* the court never held opinions were per se unworthy of full protection but simply held that by "content, form and context" the opinion at issue therein was unprotected.

higher officials to not engage in potentially illegal, unethical or wasteful courses of conduct. See *Gross v. Winters*, 876 F.2d 165, 173 (D.C. Cir. 1989).

Federal cases have made it exceptionally clear that the fact that an employee's statement is not made to the public "does not" affect a First Amendment analysis. See, e.g. *Fox v. District of Columbia*, 83 F.3d 1491, 1494 (C.A.D.C. 1996). As noted in *Fox* at 1494 "...we are not surprised that our search has yielded no case supporting the idea that a communication made within internal channels is on that account any less likely to be about a matter of public concern".

While this is not a case where the employee's speech addressed rampant illegality, protected speech also includes that which addresses potential misuse of public funds, wastefulness, and the competency and efficiency of public service. See *Hyland v. Wonder*, 972 F.2d 1129, 1137-38 (9th Cir. 1992). Even expression of indignation about a supervisor's job performance is protected as is in some circumstances belligerent and indolent speech. See *Johnson, supra*; See also *Sheppard v. Beerman*, 94 F.3d 823 (2d Cir. 1996).

On analysis of the content, form and context of petitioner's speech (which included both verbal

opposition and his "white paper") there is no question that petitioner's speech was on matters of public concern. By context, the Court of Appeals' focus was simply too narrow because it failed to recognize the historical background in which the dispute arose. Historically, Jack Wilson's management program had saved WSH pharmacy and had improved it to one of the best in the country. It was that management system that Jack was speaking up to protect. The whole purpose of the system was to maximize patient care. (RP83-5).

If one actually reads petitioner's "white paper" by content it addressed the need to conform to recognized national standards and a need to emphasize competency in this portion of the public sector over educational credentials that may not translate into effective and efficient performance of public duties. The "white paper" is also protesting against actions that could so severely impact staff morale that there would be a rash of resignations. All of these concerns were being raised in the context of a mental hospital pharmacy that, scant years earlier, was so badly managed that it teetered on failure, dragging the hospital down with it.

Not as directly, but sufficiently, the "white paper" addressed the gross waste of public funds that would result if the reorganization plans and credentialling system of the pharmacy would have to be scrapped.

While Katy Williams' underlying complaint was solely about self-interest, there is simply no question Jack Wilson's response addressed the core mission of the agency and how to maintain an efficient organization that conformed to national standards, which was successful in its mission of curing the ill. Such speech falls within the "hardcore" of public concern and should have been deemed worthy of the highest rung of First Amendment protection.

B. The Court of Appeals Misapplied The Balancing Test.

It is also beyond dispute that the Court of Appeals misapplied the balancing test which determines whether speech on public concern can nevertheless be subject to suppression. See *Pickering v. Board of Educ.*, 391 U.S. 563, 568 (1968). Under that test, speech on issue of public concern can nevertheless be suppressed if it impedes legitimate government interest. See *Hyland v. Wonder*, 972 F.2d at 1139-40. See also *Hyland v.*

Wonder (II), ___ F.3d ___ (9th Cir. 06-25-97).

Recently, this Court has determined reasonable predictions of disruption are sufficient. See *Waters v. Churchill, supra*. However, the government has the burden of showing some disruption is probable and not merely possible. *Larkin v. Town of West Hartford*, 891 F.Supp. 719, 724-24 (Conn. 1995). *White v. State*, 131 Wn.2d at 16. Broad unsupported allegations are insufficient and the government's burden is to prove the very speech at issue caused the disruption complained of and not some other source. *Kincade v. City of Blue Springs. MO.*, 64 F.3d 389, 398 (8th Cir. 1995); *Waters v. City of Philadelphia*, 55 F.3d 886, 897 (3rd Cir. 1995). When the government employer fails to provide proper evidence of disruption, it is appropriate for a court to not even conduct the *Pickering* balancing test. *Kincade* at 398. See also *Chateaubriand v. Gaspard*, 97 F.3d 1218, 1224 (9th Cir. 1996). As recognized in *Waters* plurality opinion, the seminal cases of *Pickering v. Bd. Of Educ.*, 391 U.S. 563 (1968); *Connick v. Meyer*, 461 U.S. 138 (1983); and *Perry v. Sindermann*, 408 U.S. 593 (1972) all came before the Court under circumstances where the employer was aware of the content of the speech and concededly fired

the employee because of it. *Waters v. Churchill, supra.*

In the instant matter, the respondents denied they retaliated against petitioner for engaging in protected speech. Under the above standards, you cannot both deny and justify. Yet, the Court of Appeals, apparently recognizing the total failure of proof by the State on this issue, endeavored to substitutes its opinions and speculations as to what the defendants could have based the adverse decision on even though no proof was presented to support the proposition. "Wilson's recalcitrance could have seriously impaired the Hospital's ability to maintain a harmonious and discrimination-free work place." (A-15) (Emphasis added). The Court of Appeals' manufacture of justifications that did not actually motivate the defendants was fundamentally erroneous. It should not be the function of a reviewing court to engage in "unadorned speculation as to the impact of speech" on a government enterprise. *Weisbush v. County of Los Angeles*, ___ F.3d ___ (9th Cir. 07-11-97).

The proof presented by respondents more properly went to causation and should not have been considered as part of the balancing test. See *White v. State*, 131 Wn.2d at 16.

As discussed above, the Court of Appeals clearly misapplied the law with respect to the protected nature of petitioner's speech and the total failure of the government to put anything on its side of the *Pickering* balance. It is respectfully suggested that the law in this area was so clearly established that no reasonable public official would have believed their conduct was lawful in retaliating for protected speech when they cannot even articulate a countervailing interest that would be served by doing so. See, e.g., *Edwards v. DOT*, 66 Wn.App at 564-65; *Lambert v. Richard*, 59 F.3d at 136.

It is humbly submitted that the judicial manufacture of post hoc justifications for suppression of public employee speech (especially on a fully developed record) has the potential and does fundamental injury to First Amendment rights of all public employees and such a process can only send a chill to public employees who now not only have to overcome the fear of employer retaliation before speaking up but also that relief and protection will be denied for reasons unrelated to anything articulated by the employer but created by the very judicial system from which he or she is seeking protection.

Having placed nothing on their side of the *Pickering* balance, the respondents gambled that a jury would find no causal link and lost. Such an issue under applicable precedent has always involved a question for the fact-finder. See, e.g. *Wytrwal v. Saw School Dist.*, 70 F.3d 165, 1717 (1st Cir. 1995); *Clements v. Airport Authority of Washoe County*, 69 F.3d 321, 335 (9th Cir. 1995).

C. Qualified Immunity In First Amendment Cases.

Public employee First Amendment rights have been clearly established for decades. See *Rankin v. McPherson*, 483 U.S. 378, 383, 107 S.Ct. 2891, 97 L.Ed.2d 315 (1987); *White v. State*, 131 Wn.2d at 10.

Contrary to the state court opinion herein and as recently explored in an opinion of this court, factual identity to previous precedent is unnecessary before the law can be deemed "clearly established". See *United States v. Lanier*, ___ U.S. ___ (03-31-97).

As explained in Justice Souter's opinion in *Lanier*:

> This is not to say, of course, that the single warning standard points to a single level of specificity sufficient in every instance. In some circumstances, as when an earlier case expressly leaves open whether a general rule applies to the

> particular type of conduct at issue...But general statements of the law are not inherently incapable of giving fair and clear warning, and in other instances a general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question, even though "the very action in question has [not] previously been held unlawful."

See also *Anderson v. Creighton*, 483 U.S. 635, 640, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987). Government officials are charged with the knowledge of all constitutional and statutory development including all available decisional law. *Gutierrez v. Mun. Ct. of S.E. Judicial Dist.*, 838 F.2d 1301 (9th Cir. 1988).

Once it is established that the law was clear, the burden shifts to the government to show that a reasonable officer could have believed, in light of settled law, that no constitutional rights have been violated. *Collins v. Jordan*, 110 F.3d 1363, 1369 (9th Cir. 1997).

As noted in *Melton v. City of Oklahoma City*, 879 F.3d 706, 727-29 (10th Cir. 1989) there is a clear split of authority among the federal circuit courts as to whether or not the *Pickering* balancing test can or should be incorporated in the qualified immunity analysis. The Ninth Circuit has clearly rejected the

strict application of the balancing test in an immunity analysis because it would "eviscerate whistle blower protection for public employees". *Roth v. Veteran's Admin.*, 856 F.2d 1401, 1410 (9th Cir. 1988).

In the instant matter, obviously the Court of Appeals' qualified immunity analysis was skewed by its willingness to manufacture a speculative justification. However, even without such a blatant analytical error, it would appear the opinion at issue herein requires a factual identity of precedent well beyond the controlling precedent of this court and even beyond that of the circuit courts which are more apt to grant qualified immunity on public employee First Amendment claims.

On reversal of the appellate court's determination on the merits, its grant of qualified immunity also must be reversed.[8]

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[8]The opinion below also reversed a civil conspiracy claim brought under state common law. However, given the damages were awarded in the form of a general verdict, the presence of such a claim should not impede a reversal and remand with reinstatement of the underlying verdict. See *Wheeler v. Catholic Archdiocese*, 124 Wn.2d 634, 641-42, 880 P.2d 29 (1994).

CONCLUSION

The opinion at issue herein works a great injustice and does mischief to our First Amendment. It is contrary to well established precedent of this and many other courts. While pragmatic concerns place limitations on the speech of public employees as compared that of private citizens, it is suggested such concerns must be the actual reasons for governmental action and not the subject of judicial host hoc manufacture. The errors in the opinion at issue herein have a true capacity for repetition that will not end until the highest court speaks once again on the subject matter.

It is humbly submitted that it does the First Amendment and public no good and probable evil when there is even a scintilla of confusion as to the scope, parameters, and procedures applicable to a public employee's First Amendment rights to speak out on issues of public concern. Public employees are our first line of defense against the unlawful or misguided. Their right to speak should not be as narrowly construed as done in the opinion at issue herein.

It is respectfully prayed a writ of certiorari issue and after full consideration the state appellate court

decision at issue be reversed and remanded with direction to reinstate the jury's verdict.

Respectfully submitted,

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APPENDIX A

SEINFELD, C.J. - John Wilson, a pharmacist at Western State Hospital, claimed that Hospital management wrongly removed him as director of the pharmacy department in retaliation for certain comments he made regarding personnel management. A jury agreed and awarded Wilson $9,000,000.00 for this violation of his constitutional right of free speech. We hold that the Hospital's interest in proper personnel management outweighs the minor "public concern" content of Wilson's comments. Accordingly, Wilson's speech was not protected by the First Amendment and the trial court erred in submitting the free speech claim to the jury. Thus, we reverse with directions to dismiss.

FACTS

When the Hospital hired Wilson as director of its pharmacy department, it was experiencing difficulties with its Medicare certification and its accreditation by the Joint Commission on Accreditation of Healthcare Organizations. The loss of the certification and accreditation could have cost the Hospital about $40 million in annual revenue from the federal government. As the pharmacy's director, Wilson had supervisory and management responsibility,

but his job description and pay scale were the same as the Hospital's other clinical pharmacists.

Wilson took several steps to bring the pharmacy into compliance with federal requirements. He developed policies and procedures; designed a degree-blind, skills-based pharmacist credentialling system; and implemented several workload measurement systems. The pharmacy department improved during Wilson's tenure, and Wilson received positive performance evaluations.

Wilson added two clinical pharmacists to the staff: Kathleen Williams and David Watson. Wilson encouraged Williams during her first two years. He promised that he would give her more desirable assignments as she developed her expertise and passed the competency examination he had developed. In particular, she said he would reduce the number of hours that she was required to dispense drugs, allowing for an increase in clinical work, the more sought after assignment. But this did not occur.

Wilson continued to require Williams to dispense drugs 14 hours per week but limited Watson's dispensing time to a maximum of 10 hours per week. Although Watson had not taken the competency examination and despite Wilson's own "degree-blind" credentialling system, Wilson justified this discrepancy by pointing to Watson's

pharmacy degree and post-doctoral training.

Williams complained to Wilson, requesting him to equalize the dispensing hours. When Wilson failed to respond, Williams addressed a written complaint to Dr. Darrell Hamilton, former Hospital superintendent, and then current director of professional services. Dr. Hamilton agreed with Williams and directed Wilson to equalize the dispensing time and provide dispensing time data for each of the clinical pharmacists.

Displeased, Wilson discussed the situation with his pharmacy management team and decided to write a "White Paper" to "educate this man . . . . [because h]e doesn't understand gender discrimination criteria." Wilson argued that adjusting William's dispensing time would destroy his management system, leading to poorer patient care: "I would have every other pharmacist in the department coming in and saying, well, now I want this and I want that, and we just couldn't - it would have just caused a terrible situation among our staff. It just would have been unworkable, totally unworkable."

When Wilson failed to provide the data, Dr. Hamilton directed him to stop workload measurement procedures because they were counter-productive and to equalize Williams's and Watson's dispensing times. As a

result, Wilson threatened to resign.

In response, John Reynolds, the Hospital's new superintendent, met separately with Wilson, and then with Wilson, Williams and Travis Aitken, the Hospital's personnel officer. Following these meetings, Reynolds requested an Office of Equal Opportunity (OEO) investigation and asked Wilson to try to reconcile with Williams.

Wilson met with Williams but the meeting apparently was unsatisfactory as Williams proceeded to file a gender discrimination complain with OEO. The OEO investigated the claims and then recommended that the Hospital equalize William's dispensing time with Watson's. It also proposed a settlement. Although Williams and Aiken approved the proposal, Wilson refused to agree to it.

About five months after Williams's initial complaint, 11 of the Hospital's 14 pharmacy technicians signed a union-sponsored grievance against Wilson attacking his management practices. Wilson alleged that Williams incited the technicians to grieve and provided them with information supporting their complaint.

After efforts to resolve the grievance failed, Dr. Hamilton, then Director of Professional Services,

temporarily removed Wilson. To gain a better understanding of the situation, Dr. Hamilton decided to manage the department himself. He also brought in two outside consultants, Dr. Paul Burkhart, the pharmacy director at the University of Washington Medical Center, and Richard Ager, the pharmacy director at Eastern State Hospital. The consultants recommended a department reorganization and apparently suggested that, under the circumstances, Wilson could no longer be effective manager.

Dr. Hamilton removed Wilson as director and resigned him to another pharmacy position with equal pay. Williams was the only clinical pharmacist interested in the then-vacant director position so Dr. Hamilton appointed her as the new director.

When Wilson returned after several months from a leave of absence, he worked under Williams's supervision and according to Wilson, was poorly treated. There was no private offices available at that time so, Wilson had to work at desk near the reception area. Wilson testified that this was demeaning and embarrassing. Further, Wilson claimed that Watson secretly tape recorded a meeting between the two of them and stole one of his computer disks.

Sometime later, Dr. Ira Klein became Wilson's supervisor. Wilson contends that Dr. Klein offered him additional post-doctoral training, but later delayed in following through with the offer. Eventually, Dr. Klein agreed to the training if Wilson would agree to submit a post-dated letter of resignation. Wilson declined on the grounds that this would be unethical.

At this point, Dr. Klein resigned. Dr. Hamilton, his new supervisor, directed Wilson to work on extracting pharmaceutical profile information from patient charts in the medical records department. His salary and benefits remained the same. Wilson, however, claimed that this task was demeaning and beneath his professional skill level; that the physical work environment was an unpleasant basement room; and the he was not adequately equipped as he did not have a private room, a computer, or library access.

Meanwhile, Wilson received two outside research grants that required much of his time. To accommodate his schedule, Hospital administration permitted Wilson to work less than half-time and later allowed him to reduce his work hours to 10 hours per week.

Dissatisfied, Wilson sued the State of Washington, Dr. Hamilton, William, Watson, and Reynolds (the

defendants). He claimed that his comments "against settling a false and frivolous claim of gender discrimination . . . constituted speech on matter of public concern protected by the 1st Amendment and the public policy of the State of Washington." He alleged that the defendants, "[i]n retaliation for said advocacy," "demoted" him by removing his director responsibilities and engaged in a civil conspiracy.[1] The jury found for Wilson on the free speech and civil conspiracy claims and awarded him $400,000 in economic damages, $8,000,000 in non-economic damages, and $600,000 in punitive damages.[2]

The defendants contend that the trial court erred in allowing the jury to decide the free speech claim as Wilson's comments were not protected speech. The also challenged the trial court's denial of their motion to dismiss the civil conspiracy claim for insufficient evidence.

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[1]At various points throughout the proceedings, the trial court dismissed Wilson's claims of fraudulent misrepresentation, gender discrimination, due process violations, harassment, defamation, tortious interference with a business relationship, and outrage. Wilson does not appeal the dismissal of any of these claims.

[2]Two hundred thousand dollars each against Dr. Hamilton and Reynolds; $100,000 each against Williams and Watson.

FREE SPEECH CLAIM

When a public employee claims a violation of free speech, the court must consider and resolve the tension between two competing interests. *Pickering v. Board of Educ. Of Township High Sch. Dist.*, 205, 391 U.S. 563, 568, 88 S.Ct. 1731, 20 L. Ed. 2d 811 (1968). On the one hand, public employees have a First Amendment right to comment on matters of public interest, even when such speech involves the agencies who employ them. *Pickering*, 391 U.S. at 568. On the other hand, public employer shave a legitimate interest in fulfilling their public mission and must be able to act accordingly. *Pickering*, 391 U.S. at 568.

[1] Initially, the employee claiming a free speech violation must show that the speech in question is entitled to constitutional protection. *Mt. Healthy City Sch. Dist. Bd. Of Educ. v. Doyle,* 429 U.S. 274, 287, 97 S. Ct. 568, 50 L. Ed. 2d 471 (1977). Here, Wilson claims that his comments about the management of the pharmacy department, as set out in the "white paper", deserve such protection.

To determine whether the Constitution protects this speech, the court must ask: (1) Does the speech deal with matters of public concern?; (2) If so, is the employee's

free speech interest greater than his employer's interest in promoting the efficiency of the public services it performs?; (3) If so, was the speech a substantial motivating factor in his discharge or transfer?; and (4) If so, in the absence of the protected speech, would the employer have made the same decision? *Connick v. Myers*, 461 U.S. 138, 147-48, 103 S. Ct. 1684; 75 L. Ed. 2d 708 (1983); *Binkley v. City of Tacoma*, 114 Wn.2d 373, 382, 787 P.2d. 1366 (1990).

I

PRESERVATION

[2] Defendants contend that the trial court erred by permitting the jury to determine the first two elements of the inquiry. Wilson claims that the defendants did not raise the issue before the trial court by moving for dismissal at the close of Wilson's case or for a directed verdict at the end of their own case. They did, however, move for dismissal of Wilson's First Amendment claim, thereby giving the trial court the opportunity to consider and rule on the issue. Accordingly, we too will consider it. *Washburn v. Beatt Equip. Co.*, 120 Wn.2d 246, 291, 840 P.2d 860 (1992); *Bennett v. Hardy*, 113 Wn.2d 912, 917, 784 P.2d 1258 (1990); *East Gig Harbor Improvement Ass'n v. Pierce County*, 106 Wn.2d 707, 709 n.1, 724 P.2d 1009 (1986).

II

PUBLIC CONCERN

[3] The trial court, not the jury, must decide, as a question of law, whether speech relates to an issue of public concern. *Rankin v. McPherson*, 483 U.S. 378, 386 n. 9, 107 S. Ct. 2891, 97 L. Ed. 2d 315 (1987); *Binkley*, 114 Wn.2d at 382; *Edwards v. Department of Transp.*, 66 Wn.App. 552, 560, 832 P.2d 1332 (1992). Thus, the trial court erred in allowing the jury to decide this question and we review the issue de novo. *Connick*, 461 U.S. at 148 n.7, 150 n.10; *Binkley*, 114 Wn.2d at 373.

[4] The employee has the initial burden of proving that the speech touches on matters of public concern. *Connick*, 461 U.S. 147-48; *Binkley*, 114 Wn.2d at 382. If the employee fails to bear that burden, the inquiry ends. *Ferrara v. Mills*, 781 F.2d 1508, 1512 (11th Cir. 1986). In deciding whether Wilson met this burden, we look to the content, form, and context of the speech as revealed by the entire record. *Connick*, 461 U.S. at 147-48. We also consider the speaker's intent - Did he mean to raise an issue of public concern or simply intend to further a personal interest? *Edwards*, 66 Wn.App. at 560.

Mere cloaking of otherwise private matters in the mantle of public concern is insufficient to raise First

Amendment concerns. *Connick*, 461 U.S. 147-48; *Binkley*, 114 Wn.2d at 387. An employee who acts as a concerned citizen interested in bringing problems to light more likely raises a matter of public concern than does one who attempts to rectify work place problems. *Binkley*, 114 Wn.2d at 385. Further, speech that occurs during the discharge of an employee's duties likely does not touch on matters of public concern. *Koch v. City of Hutchinson*, 847 F.2d 1426 (10 Cir.) *cert. denied*, 488 U.S. 909 (1988). Likewise, speech that offers the speaker's personal opinions or beliefs does not implicate matters of public concern, especially when it occurs in the work setting. *Koch*, 847 F.2d at 1447. Finally, a speaker who is part of management and is thereby obligated to implement its policies but who, instead, criticizes the policies and refuses to support them, might not be able to call upon the First Amendment for protection. *McKinley v. City of Eloy*, 705 F.2d 1110, 1115 (9th Cir. 1983).

These guidelines indicate a judicial sensitivity to the adverse consequences of providing constitutional protection for all statements made by public employees. *Berg v. Hunter*, 854 F.3d 238, 242 (7th Cir. 1988), *cert. denied*, 489 U.S. 1053 (1989). Uncontrolled employee debate about the wisdom of internal office decisions could

seriously impact productivity and affect the public institution's ability to carry out its mission. *Knapp v. Whitaker*, 757 F.2d 827 (7th Cir.), *cert. denied*, 474 U.S. 803 (1985). Also, if every comment was of public concern and deserving of constitutional protection, every institutional response to a comment could provoke judicial scrutiny. *Berg*, 854 F.2d at 242.

Wilson argues that his comments relate to the quality of care that State mental hospital patients receive and, thus, are a matter of public concern. He contends that a failure to follow his work assignment plan would directly affect the care received by the Hospital's patients.

Of course, the quality of patient care provided by state institutions is of public concern. But Wilson's speech is not clearly connected to the provision of quality patient care. *See Mahaffey v. Kansas Bd. Of Regents*, 562 F.Supp. 887, 890 (D.C. Kan. 1983) (invoking a presumed public interest in the way public institutions are run, alone, is not sufficient to transform a personal matter into one of public concern); *Meyer v. University of Washington*, 105 Wn.2d 847, 851, 719 P.2d 98 (1986) (individual grievance is not converted to issue of public concern by invoking a popular interest in the way public institutions are run).

Several federal court decisions are helpful in

applying the public concern guidelines to the facts at hand. The Seventh Circuit concluded that a teacher's speech criticizing class size and the lack of discipline, while of general interest to the public, was not a matter of public concern because the teacher intended her speech "to benefit only her personal interests in a private dispute with her employer." *Cliff v. Board of Sch. Comm'rs*, 42 F.3d 403, 409 (7th Cir. 1994). The *Cliff* court noted that the teacher complained only in response to criticism directed at her; she stated her complaint in the context of her own circumstances rather than in general terms; nothing indicated that she was speaking for teachers as a whole,; and the teacher made no effort to call public attention to the matter. *Cliff*, 42 F.3d at 410-11.

The Eleventh Circuit reviewed a case brought by a nurse-manager who alleged the hospital retaliated against her for speech concerning contaminated surgical instruments left in the surgical corridor. *Pearson v. Macon-Bibb County Hosp. Auth.*, 952 F.2d 1274, 1276 (11th Cir. 1992). The *Pearson* court found the nurse's speech motivated by her own personal interest in maintaining her position and not being reprimanded. *Pearson*, 952 F.2d at 1278-79. Consequently, it determined that the speech was not protected by the First Amendment. *See also Ballard v.*

Blount, 581 F.Supp. 160, 164 (1983) (teacher's remarks about the manner in which teachers were assigned to classes, and development and approval process for syllabus are private issues even though plaintiff contended they could have an affect on the public), *aff'd*, 734 F.2d 1480, *cert. denied*, 469 U.S. 1086 (1984); *Knapp*, 757 F.2d 827, *Ferrara*, 781 F.2d 1508; *Mahaffey*, 562 F.Supp. 887 (teachers' criticism of class assignments not a matter of public interest despite contentions that assignments detrimentally affect students' educational process).

Here, Wilson directed his "white paper" to Dr. Hamilton, referring to it as "RESPONSE TO DR. KATHLEEN WILLIAMS['S] CONCERNS." The "white paper" contains the following four major sections: a summary, background information, an assessment, and recommendation. The summary section restates Williams's complaints and Wilson's responses. The background information section describes the then-current status of hospital pharmacist assignments, comments about Williams's work and likely future assignments, Wilson's recruiting efforts, Williams's philosophical concerns about Wilson's use of pharmacists, and a discussion of the Hospital's past, current and future reputation.

The assessment section focuses specifically on the

dispute with Williams. For example, point one begins, "Dr. Williams has misstated her situation to you . . . ." Point three states that "The hiring and task assignments of Dr. Watson were well justified . . . ." Wilson then comments about his goal to reorganize the department and his concern that implementing Williams's request would set "a dangerous precedent," undermine his role, and undermine the credentialling process. Wilson then devotes one full page of the vie and one-half page document to restating and responding to William's seven specific concerns.

The recommendation section contains six points, four of which are requests regarding the Williams controversy. Point three asks for immediate implementation of a "pharmacist workload measuring system" and point six asks for a formal review by the chair of pharmacy practices at the University of Washington or Washington State University.

Applying the *Connick* content, form, and context analysis, it is apparent that the "white paper's" content involves an internal office matter that affected Wilson's position within the Hospital. Wilson's speech, like that of the plaintiffs in *Ballard, Knapp, Ferrara, Mahaffey and Cliff*, it is criticism of the allocation of human resources. Wilson, like the plaintiff is *Cliff, Ballard, Knapp, Ferrara* and

Mahaffey, attempts to link his speech to the broader issue of patient care in order to invoke the mantle of public concern. The "white paper" however, basically is a justification of Wilson's administrative decisions and personnel assignments.

The form of the speech is a memo to Wilson's superior, Dr. Hamilton. Like the speech in *Cliff*, the comments are addressed solely to an internal audience. There is not indication of an intent to bring a problem to the public's attention.

The context in which Wilson wrote the "white paper" reinforces the conclusion that Wilson was dealing with an issue that affected his position at the Hospital, and only in directed with the general welfare of hospital patients. Wilson wrote his "white paper" after Hospital administration responded to Williams's complaint about her work assignment and her suggestion that she was a victim of gender discrimination. As Wilson himself stated, the administration's response threatened to undermine his role and responsibility.

Evidence as to Wilson's intent in writing the "white paper" comes from its content, form, and context. The above analysis of those three factors suggests that Wilson was seeking to rectify workplace problems related to the

discharge of his duties. The "white paper" contains his personal opinion as to the most desirable way to organize the pharmacy department. In summary, we see no significant difference between Wilson's speech and that of the plaintiffs in the foregoing cases. Thus, we conclude that the "white paper" raises issues of personal, not public concern.

All of the cases that Wilson cited are factually distinguishable from the instant case.[3] In each, the

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[3]*Givhan v. Western Consol. Sch. Dist.*, 439 U.S. 410, 99 S.Ct. 693, 58 L.Ed.2d 619 (1979) (dismissal of teacher who publicly charged racially discriminatory policies and practices within school district); *Johnson v. Multnomah County*, 48 F.3d 420 (9th Cir.) (firing of county employee who made statements to coworkers and others accusing her supervisory of mismanagement and possible criminal conduct), *cert. denied*, 115 S.Ct. 2616 (1995); *Kincade v. City of Blue Springs*, 64 F.3d 389 (8th Cir. 1995) (dismissal of city engineer whose report to Board of Aldermen criticized engineering and construction of dam and misuse of public funds) *cert. denied*, 116 S.Ct. 1565 (1996); *Hyland v. Wonder*, 972 F.2d 1129 (9th Cir. 1992) (terminated of probation department volunteer who criticized juvenile hall conditions to judges was terminated), *cert. denied*, 508 U.S. 908 (1993); *Starrett v. Wadley*, 876 F.3d 808 (10th Cir. 1989) (discharge of county employee who complained of supervisor's sexual harassment and problems with alcohol); *Roth v. Veteran's Admin. Of Gov't of U.S.*, 856 F.3d 1401 (9th Cir. 1988) (discharge of physician hired to correct deficiencies in alcohol abuse unit who repeatedly reported wastefulness, mismanagement, unethical conduct, violations of regulations and incompetence); *Conaway v. Smith*, 853 F.2d 789 (10th Cir. 1988) (terminated of city inspector who cited facility

plaintiff charged misfeasance, malfeasance or nonfeasance by a public officer. In each, the plaintiff attempted in some fashion to bring the claim to the public's attention. In each, plaintiff's speech invoked a broad public issue that only tangentially affected the plaintiff's position within the organization. And in each, a successful resolution of the plaintiff's claim would have brought the plaintiff little more than the personal satisfaction of performing a public service. Moreover, none of the plaintiffs' speech occurred in the context of an ongoing management dispute.

Here, Wilson threatened that failure to make personnel decisions in accordance with his management plan would be detrimental to the Hospital. He was not seeking to inform the public that the administration was derelict in serving Hospital patients. Rather, he was justifying his own actions and philosophy and attempting

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for public safety hazard violations and who reported his supervisors for using city employees to perform private and political campaign work); *Cox v. Dardanelle Public Sch. Dist.*, 790 F.2d 668 (8th Cir. 1986) (dismissal of teacher who spoke publicly about school policies and practices); *McKinley*, 705 F.2d 1110 (firing of police officer who publicly criticized the city's decision to not give annual raises); and *White v. State*, 78 Wn.App. 824, 898 P.2d 331 (1995) (transfer of administrative assistant who reported case of suspected patient abuse), *review granted*, 128 Wn.2d 1024 (1996).

to protect his own position. Although the general topic of quality patient care is one of public import, the connection between that topic and Wilson's speech is tenuous. Accordingly, we conclude that Wilson made his comments on behalf of his own interest and the speech was not of public concern.

III

WEIGHING THE STATE'S INTEREST

[5] Even were we to assume the speech had some public concern value, the Constitution would not afford Wilson protection unless that value was greater than the Hospital's interest in fulfilling its mission. *Connick*, 461 U.S. at 147-8. This also is a question of law of the trial court to determine. *Rankin*, 483 U.S. at 386; *Binkley*, 114 Wn.2d at 382. Again, we review the issue de novo. *Connick*, 461 U.S. at 151 n.10.

Here, the Hospital's interest in having its employees efficiently and properly fulfill the Hospital's legal function clearly outweighed the slight public concern value of Wilson's speech. *Pickering*, 391 U.S. 563. The Hospital has a duty to resolve employee grievances and to maintain a discrimination-free work place. RCW 49.60.180(2), (3). It also has an interest in avoiding disruption and assuring compliance with management decisions. *Connick*, 461 U.S.

at 151; *Binkley*, 114 Wn.2d at 385; *Rankin*, 483 U.S. at 388. A public employer needs wide discretion and control over the management of its operation. *Connick*, 461 U.S. at 151. These interest were frustrated by Wilson's refusal to comply with his supervisor's requests.

Upon reviewing the facts and circumstances in context, it is clear that the Hospital's management decisions were appropriate in light of its mission. After Williams complained of unequal treatment, the Hospital had a duty to investigate and respond. RCW 49.60.180(2), (3). Ultimately, the Hospital administrators had the authority and responsibility to resolve this personnel dispute and to assure compliance with their directives. Wilson's recalcitrance could have seriously impaired the Hospital's ability to maintain a harmonious and discrimination-free work place.

In sum, the degree of public concern related to Wilson's speech was slight while the Hospital's interest in effective management and in not violating another employee's employment rights was significant. Constitutional protection for Wilson's speech would hinder management's ability to carry out its responsibilities. Thus, we conclude that the Hospital's legitimate interests outweighed any free speech interest that Wilson had in his

"white paper" comments, and that Wilson's speech was not entitled to constitutional protection. Accordingly, Wilson's First Amendment claim fails as a matter of law.

IV

QUALIFIED IMMUNITY

Additionally, defendants claim that the doctrine of qualified immunity shields them from liability. Wilson asserts that the defendants waived this affirmative defense by their failure to plead it.

[7-9] Qualified immunity is immunity from suit, not immunity from liability. *Alvarado v. Picur*, 859 F.2d 448, 451 (7th Cir. 1988). Its purpose is to protect the individual government employee from the inhibiting effect that the fear of personal liability might create. *Savage v. State*, 127 Wn.2d 434, 446, 899 P.2d 1270 (1995). It does not apply to the State when, as here, the State is sued in its respondeat superior capacity. *Savage*, 127 Wn.2d at 436. Thus, the trial court did not err in denying the State's motion for a judgment notwithstanding the verdict on this ground.

[10] We engage in a different analysis when we consider the applicability of the doctrine to the individual defendants. First, we note that a defendant may raise the defense at any stage of the litigation, including a post-trial

motion. *Krause v. Bennett*, 887 F.2d 362, 368 (2d Cir. 1989); *Alvarado*, 859 F.2d at 451 n.3. As the defendants here raised the issue at the close of their case and agin in memorandum supporting their motion for judgment notwithstanding the verdict, they did not waive the issue.

[11,12] Public officials are immune from suit unless the "law clearly proscribed the actions" they took. *Mitchell v. Forsyth*, 472 U.S. 511, 528, 105 S.Ct. 2806 86 L.Ed.2d 411 (1985). This means that the doctrine is not applicable to defendants if, by their conduct, they violated a clearly established constitutional right of which a reasonable person would have been aware. *Anderson v. Creighton*, 483 U.S. 635, 640, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987) *aff'd.*, 922 F.2d 443 (8th Cir. 1990).

The applicability of qualified immunity to a particular individual is a question of law. *White v. State*, 78 Wn.App. 824, 837, 898 P.2d 331 (1995) *review granted* 128 Wn.2d 1024 (1996). A plaintiff seeking to rebut a defendant's claim of qualified immunity must demonstrate that the defendant's conduct interfered with a clearly established constitutional right. *White*, 78 Wn.App. At 837. "Clearly established" means that the contours of the right were so obvious at the time the official acted that a reasonable official would have understood that what he was

doing violated that right. *Brawner v. City of Richardson*, 855 F.3d 187, 192 (5th Cir. 1988) (citing *Anderson*, 482 U.S. at 640). Thus, the plaintiff "must do more 'than identify a clearly established legal test and then allege that the defendant has violated it. The plaintiff must demonstrate a substantial correspondence between the conduct in question and prior law allegedly establishing that the defendant's actions were clearly prohibited.'" *Alshuler v. City of Seattle*, 63 Wn.App. 389, 395, 819 P.2d 393 (1991) (quoting *Hannula v. City of Lakewood*, 907 F.2d 129, 131 (10th Cir. 1990)), *review denied*, 118 Wn.2d 1023 (1992).

An employee has a clearly established right to speak on an issue of public interest. *Brawner*, 855 F.2d at 192-3. And case law protects a public employee's speech that reveals the improper conduct of coworkers. *Brawner*, 855 F.2d at 193. But the record in this case does not support the conclusion that Wilson speech fits within these categories.

First, as we discussed in section II, Wilson's comments about the pharmacy's administrative structure do not qualify as speech of public concern. Second, a reasonable hospital administrator/manager dealing with Wilson's refusal to follow administrative directives would not have understood that he or she was violating Wilson's

free speech rights by reassigning him to another position of equal pay within the organization. To the contrary, a prohibition against the removal of a non-responsive manager would be unreasonable and could easily lead to organizational chaos. Thus, Wilson has failed to show that defendants interfered with his "clearly established" constitutional free speech rights. Consequently, the individual defendants may claim the defense of qualified immunity.

V

CIVIL CONSPIRACY

[13] To establish a civil conspiracy, Wilson must prove by clear, cogent and convincing evidence that (1) two or more people combined to accomplish an unlawful purpose or combined to accomplish a lawful purpose by unlawful means; and (2) the conspirators entered into an agreement to accomplish the object of the conspiracy. *Corbit v. J.I. Case Co.*, 70 Wn.2d 522, 528-29, 424 P.2d 290 (1967). Mere suspicion or commonality of interests is insufficient to prove a conspiracy. *Corbit*, 70 Wn.2d at 529.

Wilson conceded that the removal of his working title and reassignment was not unlawful. It follows then that he seeks to prove the conspiracy by the second prong -

that his removal and transfer was accomplished by unlawful means. To support this, he offers, as the illegal acts, Watson's secretive taping of their meeting. Watson's alleged theft of his computer disks, and defamation.

A. Secret Taping and Theft of Computer Disk

Viewing the evidence in a light most favorable to Wilson, and recognizing that Watson's taping and computer disk appropriation may have been illegal, there is no evidence that anyone other than Watson was involved in these acts. Thus, these acts cannot support the conspiracy theory.

B. Defamation

To show defamation, Wilson alleges that Williams said he was "out to get the technicians." Without more, this is not defamatory. Moreover, according to the record, Williams never made this statement; another individual did.

C. Technician's Grievance Against Wilson

Finally, we discuss whether evidence of the technician's grievance against Wilson supports his conspiracy claim. Wilson did not specifically cite this to support the claim either in his appellate brief or in oral argument. He did, however, include comment about his incident in his discussion of the facts. Assuming that

Wilson intended this comment as argument, we find the argument lacks merit.

As we stated above, a plaintiff seeking to provide conspiracy must show that two or more people combined to accomplish an unlawful purpose or to accomplish a lawful purpose by unlawful means. Wilson provided no authority that Williams, if she did communicate with the technicians about their grievance, acted unlawfully. Williams testified that any information she provided to the technicians was necessary to the discharge of their duties. Two other pharmacy technicians testified that the technicians decided to file the grievance because they failed to obtain a satisfactory resolution of identified concerns and that filing a grievance was the "next step." Wilson's mere suspicions will not support his conspiracy theory.

As we find no evidence of illegal act by two or more individuals, the civil conspiracy claims also fails.

We vacate the judgment and remand with instructions to dismiss the action.

MORGAN and BRIDGEWATER, JJ., concur.

APPENDIX B

THE SUPREME COURT OF WASHINGTON

JOHN R. WILSON, Petitioner, vs. STATE OF WASHINGTON; R. DARRELL HAMILTON, M.D., in his official and individual capacity; KATY WILLIAMS, in her official and individual capacity; DAVID WATSON, in his official and individual capacity; JOHN REYNOLDS, in his official and individual capacity; and JOHN and JANE DOES 1 through 5, in their official and individual capacity, Respondents.	)	No. 64986-3 ORDER C/A No. 19855-0-II

All five members of Department II of the Court considered the matters set on its May 6, 1997, Motion Calendar, and unanimously agreed that the following order be entered. Therefore, Chief Justice Barbara Durham directed that this order be entered:

IT IS ORDERED:

That the Petition for Review is denied.

I CERTIFY THAT THIS ORDER WAS ENTERED BY THE COURT ON THIS 6th DAY OF MAY, 1997.

_____

C.J. MERRITT, CLERK

APPENDIX C

FIRST AMENDMENT

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

42 U.S.C. § 1983

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to be deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."